

FEDERAL COMMUNICATIONS COMMISSION

Washington, D. C. 20554

MAR 8 2016

OFFICE OF
MANAGING DIRECTOR

Richard Reynolds, President/CEO
X5 PDX, LLC & X5 Solutions, Inc.
Post Office Box 185
Entail, WA 98811

Licensees/Applicants: **X5 PDX, LLC and X5 Solutions, Inc.**

Waiver and Refund Request, Late Payment Penalty
Disposition: **Dismissed and Denied** (47 U.S.C. § 159(c)(1); 47 C.F.R. §§ 0.401, 1.7, 1.1164; and 1.1166)

Fees: Fiscal Year (FY) 2015 Late Payment Penalty

Date Request Filed: Dec. 2, 2015

Date Regulatory Fees Paid: Nov. 25, 2015

Date Late Regulatory Fees Paid: Nov. 25, 2015

Fee Control No.: RROG-15-00016119

Dear Mr. Reynolds:

This responds to Licensee's *Request*¹ for a waiver and refund of the statutory penalty amount imposed when Licensee failed to pay the Fiscal Year (FY) 2015 regulatory fees by the deadline. As we discuss below, we dismiss and deny Licensee's *Request* because it was not filed with the Commission at the Office of the Secretary and because Licensee fails to demonstrate legal grounds or most extraordinary circumstances to waive collection of the penalty and assessed charges of collection.

Background

On November 24, 2015, Licensee submitted a letter explaining that it had "completed the deactivation process"² following its acquisition by another Interstate Telephone Service Provider; however, it failed to pay the annual regulatory fees before the deadline date. Licensee asserts, for the first time in "25 years of flawless payment and good standing with all regulatory agenc[ies], Licensee] missed one [payment]"³ that resulted in late payment penalties. Licensee asks for a "waiver of the late payment penalties as this is the first request ever made."⁴

¹ Letter from Richard Reynolds, President/CEO, X5 Solutions, P.O. Box 185, Entail, WA 98811 to FCC [no intra office listed], (dated Nov. 24, 2015; rec'd Dec. 2, 2015)(*Request*). Licensee's submission to the FCC, does not comply with the Commission's rule requiring filing with the Commission's Secretary (47 C.F.R. § 1.1166(a)(2)).

² *Id.*

³ *Id.*

⁴ *Id.*

On September 11, 2015, the Commission announced September 24, 2015, as the deadline for paying the FY 2015 annual regulatory fees.⁵ Under the law, 47 U.S.C. §159(c)(1), if the full amount is not received at the Commission's lockbox bank by the due date, a late payment penalty of 25% of the amount not paid accrues automatically. Specific to payment and penalties, "[a]ny late filed regulatory fee payment will be subject to the penalties set forth in section 1.1164,"⁶ which provides in relevant part, "[a]ny late payment or insufficient payment of a regulatory fee, not excused by bank error, shall subject the regulatee to a 25 percent penalty of the amount of the fee ... not paid in a timely manner,"⁷ "[i]f a regulatory fee is not paid in a timely manner, the regulatee will be ... assess[ed] a 25 percent penalty [and] the delinquent payor's pending applications [will be subject] to dismissal,"⁸ and "[a]ny pending or subsequently filed application ... will be dismissed if that party is determined to be delinquent in paying a standard regulatory fee."⁹

Standards

In establishing the regulatory fee program mandated by Congress,¹⁰ the Commission set out the relevant schedules of the annual fees and the established procedures for, among other matters, payment, waivers, reductions, and deferral; payment, refunds, error claims, and, penalties.¹¹

The Commission's rules at 47 C.F.R. §§ 0.401, 1.7, and 1.1166 establish the proper location and procedures for filing waiver requests and petitioning for deferral, and the consequence of dismissal for failing to comply with those rules. The Commission has designated specific offices to receive and process certain matters, thus a request for relief is *filed* only upon receipt at the location designated by the Commission.¹² For example, under section 1.1166 of the Commission's rules, a petition to waive a regulatory fee "must be accompanied by the required fee and FCC Form."¹³ If the applicant includes the fee, the request must be submitted to the Commission's lockbox bank.¹⁴ Waiver requests that do not include the required fees or form will be dismissed unless accompanied by a separate petition to defer payment due to financial

⁵ See FY 2015 Regulatory Fees Due No Later Than September 24, 2015, 11:59 pm Eastern Time (ET), *Public Notice*, DA 15-1013 (Sep. 11, 2015).

⁶ 47 C.F.R. § 1.1157(c)(1).

⁷ 47 C.F.R. § 1.1164.

⁸ 47 C.F.R. § 1.1164(c).

⁹ 47 C.F.R. § 1.1164(e).

¹⁰ See 47 C.F.R. § 1.1151.

¹¹ See 47 C.F.R. Part 1, Subpart G.

¹² 47 C.F.R. §§ 0.401 ("The Commission maintains several offices and receipt locations. Applications and other filings not submitted in accordance with the addresses or locations ... will be returned to the applicant without processing."); 1.7 ("pleadings and other documents are considered to be filed with the Commission upon their receipt at the location designated by the Commission."); *Champion Communication Services, Inc., Order on Reconsideration*, 15 FCC Rcd 23782, 23783-84 (WTB 2000).

¹³ 47 C.F.R. § 1.1166(c).

¹⁴ 47 C.F.R. § 1.1166(a)(1).

hardship, supported by documentation of the financial hardship.¹⁵ "If no fee payment is submitted, the request should be filed with the Commission's Secretary."¹⁶ Filing is accomplished by mailing or otherwise delivering a hard copy of the documents to Office of the Secretary, Federal Communications Commission, Attention: Managing Director, Washington, D.C. 20554.

Each year, the Commission establishes the final day on which payment must be received before it is considered late, *i.e.*, a deadline after which the Commission must assess charges that include the statutory late payment penalty required by 47 U.S.C. § 159(c)(1) and 47 C.F.R. §§ 1.1157(c)(1) and 1.1164, and additional charges of interest, penalties, and charges of collection required by 31 U.S.C. § 3717 and 47 C.F.R. § 1.1940. September 24, 2015, was the deadline for paying the FY 2015 annual regulatory fees.¹⁷ The Commission's Assessment and Collection of Regulatory of Regulatory Fees for Fiscal Year 2015, *Report and Order and Further Notice of Proposed Rulemaking*, 30 FCC Rcd 10266, 10286, ¶ 44, (2015) warned,

To be considered timely, regulatory fee payments must be made electronically by the payment due date for regulatory fees. Section 9(c) of the Act requires us to impose a late payment penalty of 25 percent of the unpaid amount to be assessed on the first day following the deadline for filing these fees. Failure to pay regulatory fees and/or any late penalty will subject regulatees to sanctions, including those set forth in section 1.1910 of the Commission's rules, which generally requires the Commission to withhold action on "applications, including on a petition for reconsideration or any application for review of a fee determination, or requests for authorization by any entity found to be delinquent in its debt to the Commission" and in the DCIA. We also assess administrative processing charges on delinquent debts to recover additional costs incurred in processing and handling the debt pursuant to the DCIA and section 1.1940(d) of the Commission's rules. These administrative processing charges will be assessed on any delinquent regulatory fee, in addition to the 25 percent late charge penalty. In the case of partial payments (underpayments) of regulatory fees, the payor will be given credit for the amount paid, but if it is later determined that the fee paid is incorrect or not timely paid, then the 25 percent late charge penalty (and other charges and/or sanctions, as appropriate) will be assessed on the portion that is not paid in a timely manner. [Footnotes deleted.]

¹⁵ 47 C.F.R. § 1.1166(b); Assessment and Collection of Regulatory Fees For Fiscal Year 2011, *Report and Order*, 26 FCC Rcd 10812, 10819, ¶ 17 (2011) ("A regulatee's mere allegation of financial hardship thus does not automatically entitle it to a deferral of its obligation to pay regulatory fees; only a properly supported claim of financial hardship will entitle the regulatee to a deferral. Accordingly, if a request for deferral is not supported by documentation of financial hardship, it will be denied, and an associated petition for waiver or reduction will be dismissed. A regulatee cannot delay payment on the theory that its deferral request triggered an automatic six-month extension of its obligation to pay.").

¹⁶ 47 C.F.R. § 1.1166(a)(2).

¹⁷ See FY 2015 Regulatory Fees Due No Later Than September 24, 2015, 11:59 pm Eastern Time (ET), *Public Notice*, DA 15-1013 (Sep. 11, 2015).

After the deadline, the full amount of the regulatory fee includes the 25% late payment penalty¹⁸ and, if the debt remains unpaid, the balance owed includes the accrued charges of collection, interest, and penalties. If a regulatee tenders less than the full amount owed, it is a partial payment, which is applied to amount owed as set forth in 47 C.F.R. § 1.1940(f)--first to the penalties and accrued charges, and then to the principal amount owed.¹⁹ Afterwards, any unpaid portion is a delinquent regulatory fee that incurs interest, penalties, and charges of collection under 31 U.S.C. § 3717 and 47 C.F.R. § 1.1940. Moreover, until the full amount is paid or satisfactory arrangements are made, the licensee remains a delinquent debtor subject to the Commission's administrative sanctions of dismissal as set forth at 47 C.F.R. §§ 1.1164(e)²⁰ and 1.1910.

An applicant seeking a waiver of the penalty and assessed charges has the burden of demonstrating compelling and "most extraordinary circumstances"²¹ that a waiver or deferral would override the public interest, as determined by Congress, that the government should be reimbursed for the Commission's regulatory action.²²

Discussion

For FY 2015, the deadline for paying regulatory fees was September 24, 2015.²³ Licensee failed to complete payment by that date, thus the unpaid fee became a delinquent debt and, as required by the law, we imposed the charges described above.

Licensee asserts that after 25 years of timely payments, it inadvertently missed one payment after completing a transfer of services and deactivating its business. Licensee asserts it "d[id] not have the many accounting resources [that it had] maintained over the years[, hence Licensee took over] all aspects of the close out ... upon [himself]."²⁴ These assertions do not present valid grounds for relief. The penalty required by 47 U.S.C. § 159(c)(1) and charges required by 31 U.S.C. § 3717 are not limited to situations where the failure to pay was knowing or willful. Indeed, neither the statute nor the Commission's regulations contemplates a waiver of

¹⁸ 47 C.F.R. § 1.1164 ("[a]ny late payment or insufficient payment of a regulatory fee, not excused by bank error, shall subject the regulatee to a 25 percent penalty of the amount of the fee of installment payment which was not paid in a timely manner.").

¹⁹ 47 C.F.R. §§ 1.1940(f) ("When a debt is paid in partial ... payments, amounts received ... shall be applied first to outstanding penalties and administrative cost charges, second to accrued interest, and third to the outstanding principal."), 1.1157(c)(1), 1.1164(c).

²⁰ 47 C.F.R. §§ 1.1164(e) ("Any pending or subsequently filed application submitted by a party will be dismissed if that party is determined to be delinquent in paying a standard regulatory fee The application may be resubmitted only if accompanied by the required regulatory fee and by any assessed penalty payment."), 1.1910.

²¹ *McLeodUSA Telecommunications Services, Inc., Memorandum Opinion and Order*, 19 FCC Rcd 6587, 6589, ¶ 8 (2004) (denying the request for waiver of 25 percent penalty).

²² 47 U.S.C. § 159(d); 47 C.F.R. § 1.1166 ("The fees ... may be waived, reduced or deferred in specific instances, on a case-by-case basis, where good cause is shown and where waiver, reduction or deferral of the fee would promote the public interest."). See also *Implementation of Section 9 of the Communications Act, Assessment and Collection of Regulatory Fees for the 1994 Fiscal Year, Report and Order*, 9 FCC Rcd 5333, 5344 (1994), *recon. granted in part*, 10 FCC Rcd 12759 (1995) (1994 *Report and Order*); *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*).

²³ See FY 2015 Regulatory Fees Due No Later Than September 24, 2015, 11:59 pm Eastern Time (ET), *Public Notice*, DA 15-1013 (Sep. 11, 2015).

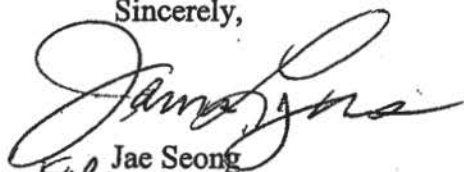
²⁴ *Request*.

or reduction in the late payment penalty based on matters such as an employee's inability to perform duties, the amount of time after the deadline within which the regulatee satisfies its payment obligations, or the absence of a reminder notice.

Every licensee is obliged to make the fee payment by the deadline. In such cases, neither the statute nor the Commission's regulations contemplates a waiver of or reduction in the late payment penalty based on the amount of time after the deadline within which the regulatee satisfies its payment obligations; indeed, the penalty for late payment applies even to situations where the deadline is missed by a short period of time.²⁵ Events and circumstances arising from the sale or transfer of a business, such as winding up financial affairs with reduced staff members are not extraordinary. Moreover, the penalty required by 47 U.S.C. § 159(c)(1) is not limited to situations where the failure to pay was knowing or willful. If it is to be waived, it is "only in the most extraordinary circumstances,"²⁶ which Licensee does not establish.

If Licensee has any questions concerning this matter, please call the Revenue & Receivables Operations Group at (202) 418-1995.

Sincerely,


For: Jae Seong
Acting Chief Financial Officer

²⁵ See *XO Communications, LLC* (OMD, Nov. 10, 2010).

²⁶ *McLeodUSA Telecommunications Services, Inc.*, *supra*.